No. 85583-8

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF MERCER ISLAND,

Petitioner,

v.

SUSAN CAMICIA,

Respondent.

THE CITY OF MERCER ISLAND'S ANSWER TO AMICUS CURIAE, WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATON

Andrew G. Cooley, WSBA #15189
Adam L. Rosenberg, WSBA #39256
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
Counsel for the City of Mercer Island

November 2, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

OTHER AUTHORITIES AND CITATIONS

I. ANSWER TO AMICUS

Defendant/Petitioner, the City of Mercer Island ("the City"), respectfully submits this Answer to *amicus curiae*, Washington State Association for Justice Foundation ("WSAJ").

WSAJ admits that it is raising an entirely new argument not advanced by either party. Consistent with the rules, the analysis should end there. Arguments raised solely by *amici* are not properly considered. But even if this were not so, the result WSAJ seeks is foreclosed by decades of precedent and the legislature's express intent. For over 30 years, this Court, along with every Division to consider the issue, consistently refused to limit immunity based upon dual uses of property. *See McCarver v. Manson Park*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979) ("Arguments to achieve such a result should appropriately be addressed to the legislature.")—and for good reason. This is absolutely consistent with the objectives of recreational immunity, and WSAJ's policy proposal would undermine them.

Ultimately, this Court need not enter the "policy debate." Existing law already yields principled results, and WSAJ's invitation to overrule the legislature—under the guise of "interpretation"—should be rejected.

A. The Court Should Not Decide This Case Based Upon A New Argument Made For The First Time By Amicus Curiae Weeks Before The Hearing Date

As a general rule, new issues raised by *amici* are not considered:

> We have many times held that questions which are not raised in any manner before the trial court will not be considered on appeal. This general rule is, likewise, ordinarily applicable to defenses and objections based upon constitutional grounds. It is further well established that appellate courts will not enter into the discussion of points raised only by amicus curiae.

Long v. Odell, 60 Wn.2d 151, 153-54, 372 P.2d 548 (1962) (internal citations omitted); *see also City of Bellevue v. Lorang*, 140 Wn.2d 19, 34, 992 P.2d 496 (2000) ("Ordinarily, we do not review issues raised solely by amicus curiae.").

As WSAJ acknowledges, by footnote, Camicia did not argue that "RCW 4.24.210 is inapplicable to lands that are part of a public transportation system." Br. at 6 n.4. But WSAJ advances the position nonetheless—based upon three incorrect assumptions. First, it suggests that its argument has "broad public import" and "could also resurface" later in the case. This is true of nearly every appeal. In *Long v. Odell*, the issue raised by *amicus* was constitutional. *Long*, 60 Wn.2d at 153-54. Yet this Court declined to reach it. Indeed, nearly all of the cases heard by this Court have "broad import," in one way or another. But that has never justified departure from the usual rules *amici* are bound by. Nor does the

possibility of remand change anything. Issues in civil cases "could"—by definition—always come up following a remand.

Second, WSAJ declares that the parties "ignore[d] the mandate of a statute or an established precedent." Br. at 6 n.4. It is difficult to know how a claimed issue of first impression, *see* Br. at 6 (one the Court "has not had occasion to address"), can simultaneously be the "mandate of a statute" or "established precedent." It cannot be,[1] and this exception is inapposite.

Lastly, WSAJ claims that consideration of its new issue is "necessary" for proper disposition of the case. Br. at 6 n.4. Of course this is untrue. Camicia does not believe this—as is evident in her briefing. Judge Inveen did not believe this. Division I did not believe this. And the City certainly does not believe this—as discussed below. Unlike *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993), where the parties overlooked a potential violation of the Supremacy Clause, this case can be resolved independent of WSAJ's arguments.

The usual prohibition on *amici* controls. If WSAJ's argument had merit, it would have been made by Camicia—where it could have been responded to, factually and legally, and resolved by Judge Inveen. As a matter of fairness, the new issue should not be reached.

[1] "There are no contradictions. If you find one, check your premises." Ayn Rand, ATLAS SHRUGGED (1957).

B. WSAJ's Proposal Ignores Longstanding Precedent, Legislative Concurrence, And The Express Purpose Of The Statute

Even if the Court reaches this issue, it fails on the merits—perhaps explaining why it was never raised. WSAJ invites the Court to ignore the plain wording of RCW 4.24.210 whenever property involves transportation.[2] Br. at 4. This is based upon *nothing* in the statute, nor case law from *any* jurisdiction. Quite simply, WSAJ is seeking a legislative determination under the guise of "interpretation." To date, neither branch of government has accepted the invitation.

1. UNIFORM PRECEDENT FORECLOSES WSAJ'S ARGUMENT

WSAJ concedes that acceptance of its position would require the Court to overturn *Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995). But, under scrutiny, it is apparent that the Court will have to do much more than that. It would have to depart from over thirty years of precedent—both its own, and that of the Court of Appeals.

This Court first confronted—and rejected—WSAJ's position in *McCarver v. Manson Park*, 92 Wn.2d 370, 597 P.2d 1362 (1979). There, a young girl struck her head after falling into a public swimming area, and

[2] WSAJ's reference to "public transportation" is analytically redundant. If property is not open to the "public," the immunity discussion ends. *See* RCW 4.24.210(1) ("allow members of the public..."). All transportation on recreational property is by definition "public transportation." The issue, then, properly framed, is whether recreational property used for ***transportation of any kind***, is *per se* excluded from the statute.

her case was dismissed on recreational immunity grounds. *Id.* at 371.[3] On appeal, she argued that immunity should be limited to locations where recreation was a secondary use. This Court rejected the proposed interpretation of the immunity statute:

> We decline to impose a limiting construction upon the statute differentiating land classifications based upon primary and secondary uses where the legislature did not. Arguments to achieve such a result should appropriately be addressed to the legislature.

Id. at 377. In *McCarver*, recreation was the primary use, to be sure. But this Court did not limit its reasoning to that fact pattern; it specifically rejected the "primary" and "secondary" limitation in its entirety. If this Court adopts WSAJ's reasoning, and strips landowners of immunity when their recreational property can be used for transportation purposes, *McCarver* is necessarily wrong.

The same is true of *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987). In *Riksem*, the plaintiff was injured while riding on the Burke Gilman bike path. *Id.* at 508. He argued, among other things, that the presence of "commuters" on the bike path changed the analysis. The court disagreed:

> ***The statute applies equally to everyone who enters a recreational area.*** If an individual is commuting from one

[3] The family alleged that the park failed to provide adequate supervision, maintained dangerous structures, and otherwise failed to enforce reasonable rules and regulations. *Id.* at 372.

> point to another, by either walking, running, or bicycling, said individual is at least secondarily gaining the benefits of recreation even though his primary goal may be the actual act of commuting.

Id. at 512 (emphasis added) (citing *McCarver v. Manson Park & Rec. Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979)).

WSAJ downplays *Riksem*, suggesting that there is "no indication that the trail is part of a public transportation system." Br. at 18. This is just plain wrong. The Burke Gilman is a major regional bike trail, extending from Seattle to Redmond, traversing Lake Forest Park, Kenmore, Bothell, and Woodinville. According to the *Seattle Department of Transportation*, it is:

> **A Major Urban Route**
>
> The Burke-Gilman Trail is an outstanding success and has been beneficial to the neighborhoods which it passes through. The trail has become a major transportation corridor that serves thousands of commuter and recreational cyclists. It demonstrates that when the proper facilities are provided many people will choose healthy, pollution-free, non-motorized modes of travel.

Seattle Department of Transportation: Bike Program.[4] Any "transportation element" on the Burke Gilman trail certainly existing to the same extent on the I-90 bike path. It follows, again, that if WSAJ is right, *Riksem* is wrong—and the Burke Gilman bike path (King County),

[4] http://www.seattle.gov/transportation/burkegilmantrailhistory.htm (last visited October 27, 2011).

the Centennial bike path (Eastern Washington),[5] the Interurban bike path (Snohomish County),[6] and countless other bike routes, can no longer remain open to gratuitous recreational use under the statute.

The case law has since been utterly uniform. In *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 774 P.2d 1255 (1989), a motorcyclist was injured ***on a road***, in a recreational area. Though he argued that his own purpose was commercial, the court found this irrelevant. The statute is viewed "from the standpoint of the landowner or occupier." *Id.* at 608. Any other result would render immunity so subjective as to be a nullity. A few years later, Division II considered *Widman v. Johnson,* 81 Wn. App. 110, 114, 912 P.2d 1095 (1996), which involved a ***car accident*** in a recreational area. Citing *McCarver*, the court reasoned that "other purposes" the road could have been used for "lack[ed] legal significance." *Id.* at 114. Similarly, in *Chamberlain v. Dept. of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995), the plaintiff was hit ***by a vehicle*** while sightseeing on the Deception Pass Bridge. *Id.* at 214-15. The plaintiff

[5] "The Centennial Trail is a 37-mile bike path in eastern Washington. In addition to recreation, portions of it are "a great option for commuters and those wishing to explore downtown Spokane." Centennial Trail, http://www.spokanecentennialtrail.org/ (last visited November 1, 2011).

[6] "The Interurban is an excellent north-south off-road, nonmotorized route that is popular with commuters between south King County and employment centers in Auburn, Kent, Tukwila, Renton, and Seattle. Access and parking are provided at numerous locations along the trail." Interurban, http://www.kingcounty.gov/recreation/parks/trails/regionaltrailssystem/interurban.aspx (last visited November 1, 2011).

argued that recreational immunity should not apply on account of vehicle traffic. The court disagreed, reasoning that "[t]he fact that 'highway' and 'sidewalk' are defined elsewhere does not require that they be excluded from the provisions of the recreational use immunity statute." *Id.* at 218.

At bottom, WSAJ's proposal leaves almost an entire body of law either overturned or nonsensical. Holding that lands usable for transportation are *per se* outside of RCW 4.24.210 is at odds with *McCarver*'s holding that alternative uses are irrelevant. It is inconsistent with *Riksem*'s holding that large, regional trails used for commuting *are* within the purview of recreational immunity. It ignores *Gaeta*'s rejection of subjective purpose (*i.e.*, commuting vs. recreation), and renders *Widman* and *Chamberlain* factually non sequitur. WSAJ offers no compelling reason for the violence it seeks to do to settled law, and this Court should not indulge it.

2. THE LEGISLATURE'S ENDORSEMENT OF THE COURTS' INTERPRETATION FORECLOSES WSAJ'S ARGUMENT

Equally important, the legislature agrees with the courts. Though it surely could have weighed in on recreational immunity after *McCarver*, and excluded transportation or biking areas from the statute's purview, it did not. This, itself, is a policy determination entitled to deference.

The legislature is presumptively aware of the courts' treatment of

recreational immunity. *See Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992); *see also In re Foreclosure of Liens*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991) (legislature presumed to know the case law in the areas where it legislates). The legislature also knows how to cast its laws in terms of "primary purpose"[7] or qualify them,[8] and could have easily done either to RCW 4.24.210. It did not—for over 30 years.[9]

The doctrine of *stare decisis* applies most strongly to issues of statutory construction. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 201-202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991) (refusing to alter interpretation of a statute where Congress had chosen not to amend it for 28 years). In *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004), the construction of the Washington Law Against Discrimination was challenged. Refusing to re-interpret a previously interpreted statute, this Court explained:

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[7] *See, e.g.*, RCW 59.20.030(10) (defining mobile home park in terms of "primary purpose" of income production); RCW 19.270.010(1) (defining "advertising" in the Computer Spyware Act by primary purpose); RCW 31.12.436(8) (defining where credit unions can invest by the "primary purpose" of the target organization).

[8] The legislature did exactly this in the recreational immunity statute. Though it broadly applies to recreational activities, conditions that are "known, dangerous, artificial, and latent" are not subject to immunity. *See* RCW 4.24.210(4).

[9] The legislature *has* returned to the recreational immunity statute a number of times, to be sure. But, contrary to WSAJ's argument, it has *only broadened* immunity to effectuate the purposes of the statute. Just this year, the legislature increased protection for landowners who artificially release water flows in areas open for recreational use. *See* RCW 4.24.210 (5388.SL) (2011).

> The Legislature is presumed to be aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.

Id. (citing *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)). Courts do not "change their mind" as to what a statute means. *Id.* at 147; *see also Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) ("Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.").

The legislature has had ongoing opportunities to artificially limit recreational immunity based upon alternative uses of the land, such as transportation, yet it has not. Instead, it left the language as it is: the property owner must merely "allow members of the public to use [land] for the purposes of outdoor recreation..." RCW 4.24.210(1). The statute does not require exclusivity or primary purpose. Nor are areas where transportation is implicated subject to special treatment.

The legislature is familiar with the case law interpreting RCW 4.24.210, and to the extent that it disagrees, is free to act.[10] Until then, however, the Court should leave policy-making to the legislature.

[10] The legislature is aware of *Gaeta*, *Riksem*, *Widman*, and *Chamberlain*, and to date, has done nothing but concurred to their reasoning and outcome.

3. THE EXPRESS PURPOSE OF THE RECREATIONAL IMMUNITY STATUTE FORECLOSES WSAJ'S ARGUMENT

Ultimately, the Court's primary goal is to determine and give effect to the legislature's intent. *Custody of E.A.T.W.*, 168 Wn.2d 325, 343, 227 P.3d 1284 (2010). This determination should be based upon statutory language. *Id.* And though omitted from WSAJ's brief, the legislature's intent is quite explicit here:

> The purpose of RCW 4.24.200 and 4.24.210 is to ***encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability*** toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

RCW 4.24.200 (emphasis added); *see also Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 523, 588 P.2d 1351 (1979) ("it is apparent that this statute was enacted because of a greatly expanding need and demand for outdoor recreational opportunities").

The legislature codified—and the courts enforced—a statute that deals in absolutes. There is no balancing or multifactor test. So long as the property owner considers his or her property recreational, immunity is generally upheld. *See Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999). In this regard, courts have uniformly rejected a

subjective, user-centric analysis, and rightly so. *See Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989).

Introduction of variables, outside the landowner's control—*e.g.*, alternative uses and viewpoints—renders immunity unreliable. Rational landowners could no longer rely upon it in sympathetic cases, and will have no trouble closing down their properties—completely frustrating the legislature's intent. The statute's purpose is "to encourage owners... to make [their properties] available to the public," RCW 4.24.200, but that can only be effectuated with predictability. Landowners cannot, and will not, maintain property open to the public, at no cost, without some ability to control their fate.

The novel limitation proposed by WSAJ frustrates this purpose. WSAJ would have the Court deny immunity whenever there is a transportation element in a recreational area. Trails and paths are contemplated in the transportation statutes. *See* RCW 47.30. Does it follow that walking paths are no longer "recreational" within the meaning of RCW 4.24.210? Water taxies and ferries cross various bodies of water. Do the bodies of water lose immunity? What about parks that include a train system or rock climbing areas? Recreation and transportation are,

many times, indelibly intertwined.[11] Thus, limiting one *by* the other leads to an unworkable test—or at best, complete unpredictability.

WSAJ's proposal also disregards the landowner's point of view—contrary to uniform case law. Even if the landowner considers property to be recreational, a contrary determination by a third party transportation agency subverts this. This is precisely what happened here. The City had always considered its bike path a purely recreational area. But because WSDOT felt otherwise—some time ago, in a totally different context—immunity is now in question.[12] This is precisely the instability that law has always guarded against.

WSAJ's argument is contrary to the legislature's intent, and should be rejected on that ground as well.

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[11] WSAJ argues that transportation is not maintained "for the amusement of travelers and does not "refresh the spirit after work." As a matter of law and common sense, this is incorrect. First, the proposition has been soundly rejected in both the courts and the legislature. *See Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987) ("If an individual is commuting from one point to another, by either walking, running, or bicycling, said individual is at least secondarily gaining the benefits of recreation even though his primary goal may be the actual act of commuting."); *see also* RCW 47.06.050(1)(c) (development and design of "scenic and recreational highways"); RCW 47.26.300 (recognizing use of bikes involve "both transportation and recreation"). Furthermore, common sense dictates that the use of a bike path for commuting (as opposed to a bus, for example) is plainly has a recreational element to it.

[12] This is undisputed, and Judge Inveen rightly granted summary judgment. Camicia then led Division I into error by introducing other, extraneous viewpoints, *see* App. Br. at 4 (Camicia's view); App. Br. at 8 (WSDOT's view), which is precisely what the legislature worked so hard to avoid.

C. There Is No Reason To Overturn Precedent And Rewrite The Recreational Immunity Statute When Fair Results Are Already Dictated By Existing Law

The change in the law proposed by WSAJ—in addition to being unsupportable—is unnecessary. The existing statutory framework permits courts to resolve immunity disputes involving transportation.

The legislature specifically defined what is, and is not, a bike path:

> For the purposes of this chapter, "trail" or "path" means a public way constructed *primarily for and open to pedestrians, equestrians, or bicyclists*, or any combination thereof, other than a sidewalk constructed as a part of a city street or county road for the exclusive use of pedestrians...

RCW 47.30.005 (emphasis added). A road, by contrast, is "that portion of a highway improved, designed, or *ordinarily used for vehicular travel*, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles." RCW 46.04.500 (emphasis added).

This distinction is significant in Washington law. RCW 46.61.770 makes it clear that bicycles can ride on roadways *or* bicycle paths. When on a ***roadway***, a bicyclist must stay to the right, be mindful of the traffic's direction and speed, and cannot ride more than one-abreast. *Id.* On a ***bike path***, however, these rules do not apply. The number of wheels is not regulated (*contra* RCW 46.04.071), and bicyclists can ride more than

2-abreast (*contra* RCW 46.61.770), or even stop and dismount mid-path.[13] The legislature is sensitive to this distinction, and by design, ensured that roads and bike paths are not interchangeable. Thus, there is no danger that recreational immunity will accidentally vitiate *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), or cities' usual tort duties.

When the legislature explicitly included "lands used for bicycling" in the recreational immunity statute, RCW 4.24.210(1), it knew what it meant; and had it wanted to counter-intuitively read "bike paths" out of the term "bicycling," it would have said so.[14] *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (courts assume that the legislature means exactly what it says); *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 579, 399 P.2d 8 (1965) (it is not the function of the courts to correct what they perceive to be legislative mistakes).

WSAJ then attempts to evade this plain reading by suggesting that it is "absurd" to "relieve state and local government entities of their customary duty of care." Br. at 17. Three responses are in order.

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[13] For that matter, there are no rules regulating *how* individuals can use the bike path. They can theoretically stop mid-path and have a baseball game or have a picnic. While this would perhaps be socially awkward, the law governing bike paths—unlike a roadway—would allow it.

[14] This would have been easy to do. The legislature could have simply stated that "bike paths, as defined in RCW 47.30.005, are excluded from this chapter" or "no activity that supports public transportation shall be recreational within the meaning of this chapter."

First, this is a quarrel more appropriately directed to the legislature. Immunities, by definition, relieve a defendant of duties. But there is nothing "absurd" about it here. The legislature expressly weighed policy considerations and concluded that opened recreational land—where liability is reduced—is better than no recreational land at all. *See* RCW 4.24.200. This is well within its authority to do. *See Andersen v. King County*, 158 Wn.2d 1, 39, 138 P.3d 963 (2006) (*en banc*) (characterizing the legislature's power to define policy as "nearly limitless").

Second, the "absurd results" argument only goes so far. As a general rule, statutes are added to on this ground when "imperatively required to make them rational." *State v. Taylor*, 97 Wn.2d 724, 729, 649 P.2d 633 (1982). To do otherwise, this court held, is a "usurpation of legislative power for it results in destruction of the legislative purpose." *Id.* (quoting Dallas Sands, STATUTES AND STATUTORY CONSTRUCTION § 47.38, at 173 (4th ed. 1973)). Again, affording bike paths immunity under RCW 4.24.210 is hardly "irrational." Even though bike paths support transportation, they are also recreational. To encourage landowners to make more bike paths available—and in the process reduce traffic and increase wellness—immunity was extended. A judicial rewrite is not "imperatively required" for rationality.

And third, there is no danger that cities will avoid their common law duties by disingenuously designating their roads as "paths." The statutes do not permit it. Roads—which are "ordinarily used for vehicular traffic"—cannot be bicycle paths. Nor can bicycle paths—"primarily open for bicyclists"—be roads. This is definitional. Moreover, the courts routinely weed out disingenuous claims of immunity. In *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999), for example, Tacoma declared by resolution that all of its lands, outside the downtown area, were "open for recreational purposes." When the plaintiff was injured, Tacoma claimed immunity. But the evidence showed that the land was only available to Indians with treaty rights. Tacoma's argument was rightly rejected. Similarly, in *Plano v. City of Renton*, 103 Wn. App. 910, 912, 14 P.2d 871 (2000), and *Nielsen v. City of Bellington*, 107 Wn. App. 662, 669, 27 P.3d 1242 (2001), the landowners sought immunity while simultaneously collecting a fee. This commercial conduct rebutted their stated recreational intent.

The I-90 bike *path*, in Mercer Island, is undoubtedly a bike path. It is for bicycles (not cars) which is precisely what Camicia was using it for. Nor is there evidence of gamesmanship. The City did not charge a fee or use the property as a road—and it certainly could have closed the path to the public if it chose to. CP 606-609. Immunity applies.

D. Even If WSAJ's Argument Were Legally Tenable—Which It Is Not—The Facts Of This Case Would Still Support The Trial Court's Ruling

It is worth mentioning, at least parenthetically, that there is no evidence that the area where Camicia fell was part of any transportation system—particularly in the City's view.

The discussion about a "transportation system" came from the State and the U.S. Department of Transportation, CP 362 (2004 EIS comments), CP 365 (WSDOT report), CP 369 (USDOT letter), CP 377 (EIS letter), and it was all exclusively directed toward ***the I-90 floating bridge***, not the path on Mercer Island.[15] *See* CP 364. Judge Inveen acknowledged this, and explained why the distinction mattered:

> It is logical to distinguish between a path alongside of a busy freeway which is the only method of crossing Lake Washington for non-mechanized users, and a path used by bicyclists and pedestrians that winds its way through city parkland adjacent to other streets over which the bikes can travel.

CP 878-79.

The City's view—that the area was entirely recreational—is entitled to deference. *See, e.g., Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999) (to determine whether the statute applies,

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[15] Importantly, ***everybody*** viewed the I-90 bike path as an important recreational resource as well. *See* CP 362 (""important function of the path"); CP 365 ("designed and built primarily for use by *bicycles*"); CP 369 ("recreation is an important function of the path"); CP 377 ("used for recreational purposes including bicycling ...."). This is consistent with the City's own, undisputed, treatment of the property. *See* CP 159; CP 178; CP 688; CP 160; CP 181-82; CP 688-89; CP 158; CP 143-45. Under *McCarver*, the statute applies irrespective of primary and secondary usage.

courts uniformly view the circumstances from the standpoint of the landowner). If a landowner brings himself within the terms of the statute, it applies irrespective of other subjective purposes. *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989). WSAJ does not contest this.

Accordingly, even if WSAJ's untenable argument were adopted, it would not change the outcome of this case.

II. CONCLUSION

As the Commissioner for this Court already explained in rejecting Camicia's earlier motion to transfer:

> [The appellate courts] have addressed issues similar or identical to those posed here. *See Riksem*, 47 Wn. App. at 509 (rejecting arguments that statute did not apply to those trails and paths, that is did not apply to successors in interest, and that it violated equal protection because it did not apply to commuters); *Gaeta*, 54 Wn. App. at 608 (rejecting argument that statute did not apply because roadway could be put to nonrecreational uses); *Widman*, 81 Wn. App. at 114 (rejecting arguments that statute did not apply because logging road did not provide access to recreational area and also served nonrecreational uses); *Chamberlain*, 79 Wn. App. 216-19 (rejecting argument that statute did not apply because walkway met statutory definitions of highway and sidewalk).
>
> * * *
>
> Perhaps this court will have to decide at some point whether the statute applies when the use ***cannot be considered in any way recreational*** (say when a logger is

> driving on a logging road). But it is not clear that the distinction matters here, since Ms. Camicia rode towards her home from work, met a friend on Mercer Island, and then bicycled around the island with her friend.

A-18 through A-19 (Order, February 25, 2010).

If WSAJ seeks to change the law, its remedy lies with the legislature. Its arguments should be rejected and Division I should be reversed.

RESPECTFULLY SUBMITTED this 2nd day of November, 2011.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

s/ Adam L. Rosenberg

Andrew G. Cooley, WSBA # 15189
Adam L. Rosenberg, WSBA #39256
800 Fifth Avenue, Suite 4141
Seattle WA 98104
206-623-8861 / 206-223-9423 FAX
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Joan Hadley, hereby certify that on the 2nd day of November, 2011, I served a true and accurate copy of the ***City's Answer to Amicus Curiae, Washington State Association for Justice Foundation*** via email upon:

John Budlong
Law Offices of John Budlong
100 Second Ave. S, Ste. 200
Edmonds, WA 98020
john@budlonglawfirm.com

Roy Umlauf
Forsberg & Umlauf
901 5th Ave., Ste. 1700
Seattle, WA 98164
rumlauf@forsberg-umlauf.com

Howard M. Goodfriend
1109 1st Ave. S, Ste. 500
Seattle, WA 98101
howard@washingtonappeals.com

George M. Ahrend
100 E. Broadway Ave.
Moses Lake, WA 98837
gahrend@ahrendlaw.com

Bryan P. Harnetiaux
517 E. 17th Ave.
Spokane, WA 99203
via gahrend@ahrendlaw.com

DATED this 2nd day of November, 2011.

s/ Joan Hadley
Joan Hadley, Legal Assistant
Keating, Bucklin & McCormack, Inc., P.S.

ORIGINAL